

CAOBISCO comments on TRIS notification 2022/827/B (Belgium)

Draft Royal Decree to limit the placing on the market of single-use products harmful to the environment

On 29 November 2022, Belgium notified to the European Commission a Draft Royal Decree to limit the placing on the market of single-use products harmful to the environment.

Article 7 of the draft Royal Decree specifically prohibits the placing on the Belgium market of the single-use products listed in Annex 3, including “plastic sticks”.

CAOBISCO contests the lawfulness of the above-mentioned measure because it may consist in a violation of the following EU legislation:

- **Directive (EU) 2019/904** of the European Parliament and of the Council of 5 June 2019 - on the reduction of the impact of certain plastic products on the environment
- **Treaty on the Functioning of the European Union:** Articles 34 and 36

1. GENERAL COMMENTS:

CAOBISCO members are strongly committed to the European Commission’s double objective (i) of evolving towards a circular economy model where the use, reuse and recycling of packaging is improved and (ii) of preventing the abandonment of waste in the environment or littering. In fact, we are more and more opting for continuous improvement of environmentally friendly packaging to be put on the market.

However, it shall be noted that to achieve these objectives, companies need harmonised regulations and the consequent legal certainty that this process provides. The lack of harmonisation between different legislations among Member States makes it extremely difficult for companies to comply with legal provisions and jeopardises their competitiveness and market unity both at national level and European level.

The SUP Directive has the main objective to prevent and reduce plastic littering and it identifies 10 items which are the most and easily dispersed in the environment. Accordingly, it also established the corresponding measures (market restrictions, consumption reduction...) to achieve the above-mentioned objectives.

Article 7 of the Draft Decree enlarges (unintentionally?) the list of those items whose usage is banned/restricted by using broader terms like “plastic stick” and “plastic skewers” instead of the wording according to the SUP (“Beverage stirrers” and “Sticks to be attached to and to support balloons”). This possible expansion of the list of single-use plastic items that are subject to restrictions or reductions within the scope of the SUP Directive could seriously jeopardize one of the fundamental pillars of the single market: **the free movement of goods within the European Union.**

As a matter of fact, the impact assessment carried out by the European Commission before the publication of the SUP Directive, concluded that market restrictions should be carried out at European level and not at the national level of the Member State.

The Commission working document on impact assessment expressly states: *“Action at EU level must avoid disruptions to the free movement of goods on the Union market, resulting from dispersed measures at national level targeting different products or the same products but with different measures, such as different product bans per country. Some measures (such as bans on certain products, design requirements, etc.) should be established at European level while others (such as reduction targets for products that do not have sufficient alternatives available or information campaigns) Member States should be free to choose between the specific methods of implementation, in line with the principle of subsidiarity”.*

The SUP Directive in Recitals 6 and 7 establishes that: *“[...] On the other hand, some of these measures, in particular the restrictions on the marketing of single-use plastic products, may create trade barriers and distort*

competition in the Union” and “In order to focus efforts where they are most needed, this Directive should only apply to single-use plastic products that are most frequently found on Union beaches, as well as fishing gear containing plastic and products made from oxodegradable plastic. Plastic sticks in general are not amongst the top 10 single use plastic products found on EU beaches, but only plastic stirrers and balloon sticks, see supporting study of the SUP: <https://circabc.europa.eu/ui/#>

In the light of the foregoing, we would like to highlight that for companies having their own business developed at EU level it is extremely difficult to comply with different national legislations when they are not harmonized with each other or with European laws, as it generates a consequent legal uncertainty, which surely constitutes a significant barrier to trade for all companies that are marketing their goods in two or more Member State.

As for this specific case, the broad definition of “plastic stick” - as included in Article 7 of the Draft - is too generic and its implementation may lead to possible misunderstandings on its scope and following application. Furthermore, this definition clearly broadens the list of items listed in the SUP Directive, since, for instance, it can include plastic sticks used for snacks and confectionery as well as other items having similar shape but different applications, e.g., toys, leading to possible breaches of the EU laws and principle as stated above.

Moreover, no data or study have proven the evidence of a significant environmental benefit of such a ban in Belgium.

Imposing top-down bans without acknowledging the guiding principles of the SUP directive, such as economic viability, would introduce heavy burdens to the industry while, at the same time, failing to guarantee in achieving the environmental goals.

2. POSSIBLE BREACH OF THE EU LAW:

Considering what indicated in Section 1, this Draft may consist in a violation of the following EU legislation:

- **Directive (EU) 2019/904** of the European Parliament and of the Council of 5 June 2019 - on the reduction of the impact of certain plastic products on the environment
- **Treaty on the Functioning of the European Union:** Articles 34 and 36

Directive (EU) 2019/904:

Article 7 of the Draft goes beyond the scope of the Directive as it foresees, starting from 1st January 2024, the prohibition to sell articles which are not included in the scope of the SUP Directive, such as “plastic sticks” in general - instead of “Beverage stirrers” and “Sticks to be attached to and to support balloons” only.

The impact assessment carried out by the European Commission before the adoption of the SUP Directive concludes by declaring that marketing bans must be adopted on an EU level and not by individual Member States. The Commission Staff Working Document - Impact Assessment, dated 28 May 2018, specifically states that “*some measures (such as bans on marketing certain products and design requirements, etc.) should be adopted on a European level, whilst for others (such as target reductions in the consumption of products for which there is no alternative), Member States should have sufficient freedom of implementation, in compliance with the principle of subsidiarity*”.

In this light, the Draft proposes specific new target reductions in line with Article 4 of the SUP Directive, but – contrary to what above stipulated – it also extend the ban of some product (see Article 7 and relative Annex 3). Article 5 of the Directive stipulates that “*Member States shall prohibit the placing on the market of the single-use plastic products listed in Part B of the Annex and of products made from oxo-degradable plastic*” and plastic sticks (which may include lollipop stick as well as another object having this shape and made of plastic) are not listed neither in Part B of the Annex nor in any other annex of the SUP Directive.

One of the objectives of the SUP Directive (i.e., Article 1) is the efficient functioning of the internal market and local bans going beyond the measures laid down by the European Directive are likely to create obstacles to the free circulation of goods in the Internal Market.

To this extent the Draft is clearly in breach of the SUP Directive.

Treaty on the Functioning of the European Union (TFEU):

Article 34 of the TFEU stipulates that the “*Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States*”. Article 36 stipulates that “*The provisions of Articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States*”. The measure foreseen in the Draft goes beyond the scope of the SUP Directive and it can be qualified as quantitative restrictions on imports and a means of arbitrary discrimination to trade between the Member States.

3. ENTRY INTO FORCE DATE

In addition to the arguments focusing on the content and effects of the proposed Royal Decree, the entry into force date, January 1, 2024, should be qualified as unrealistic.

The resulting timeline for implementation of an potentially and unexpected extension of the ban including plastic sticks in general does not acknowledge the substantial changes that the industry would be asked to bring forward to comply with new regulation. For instance, the analyses of alternatives and materials offering the same level of quality and safety or determining the technical feasibility of using these alternatives in production.

Furthermore, the industry will have to invest in dedicated production lines, implement new labelling (due to recycling instructions) and set up new distribution lines, catering the Belgian market only.

Such adaptations and investment require far more time than is foreseen in the draft text. Moreover, in absence of unambiguous legal provisions regulating a transitional period, it would also create a situation of serious legal uncertainty.